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BY ELECTRONIC SUBMISSION – ORIGINAL BY FIRST CLASS MAIL

Water Docket
Environmental Protection Agency
Mail Code: 28221T
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: Comments of Liberty University and Thomas Road Baptist Church regarding Proposed Total Maximum Daily Load for the Chesapeake Bay – Docket Number EPA-R03-OW-2010-0736

To Whom It May Concern:

This firm represents Liberty University ("Liberty") and Thomas Road Baptist Church ("TRBC"), both of which are located in Lynchburg, Virginia.[1] Liberty strongly supports the responsible restoration of the Chesapeake Bay. Since the signing of the original Chesapeake Bay Agreement in 1983, federal, state and local authorities have expended tremendous time and resources towards meeting this lofty goal, and significant progress has been made. As a result, Liberty is very concerned by the sudden shift in approach reflected in EPA's draft Total Maximum Daily Load ("TMDL") for the Chesapeake Bay (the "Draft TMDL").

It appears that, in its haste to comply with the deadlines and substance of the agency's settlement agreement in *Fowler v. United States*,[2] EPA has rushed the development of the Draft TMDL to the point that it has proposed a program fundamentally at odds with the Clean Water Act and the Administrative Procedure Act. In accordance with EPA's *Notice of Availability of the Draft TMDL and request for public review and comment on the Draft TMDL*,[3] Liberty offers the following comments regarding the Draft TMDL:

- EPA's assertions of authority to: (i) require Watershed Implementation Plans ("WIP") as part of the Draft TMDL; (ii) utilize the criteria described in the Draft TMDL to decide whether a WIP is sufficient, such as the requirement for

[1] For convenience, Liberty and TRBC are collectively referred to as Liberty except in the Background Section below.
[2] No. 1:09-CV-00005-CKK (D.D.C. filed, Jan. 5, 2009).
[3] 75 Fed. Reg. 57,776 (Sept. 22, 2010).

"reasonable assurances;" and (iii) impose the agency's backstop rule, are contrary to the Clean Water Act and EPA's TMDL regulations in 40 C.F.R. Part 130;

- EPA's focus on whether pollutant loads will cause a violation of water quality standards in the Chesapeake Bay, rather than within the geographic boundaries of a particular state, is contrary to the plain language of Section 303(d)(1)(A & C) of the Clean Water Act;

- EPA's abbreviated comment period for the Draft TMDL – as well as the unavailability of critical water quality models, data and assumptions – denies the public a meaningful opportunity to comment; and

- Assuming, *arguendo*, that EPA's backstop rule is a permissible exercise of the agency's authority under Section 303(d) of the Clean Water Act, the substantive requirements of the backstop rule are arbitrary and capricious and unsupported by substantial evidence.

The basis for Liberty's comments is below.

BACKGROUND

Liberty University is the second largest employer in the Greater Lynchburg, Virginia area, a leading economic engine for the region, and the largest land owner in the region. Liberty University, combined with Thomas Road Baptist Church, employ a total of 5,848 individuals. Between 1992 and 2009, fall enrollment increased from 8,500 to 46,949, an increase of 38,449 students, or 452 percent. Since the fall of 2009, Liberty has grown to more than 65,000 students.

In 2009, an economic study by Mangum Economic Consulting, LLC of Richmond, VA concluded that Liberty has a significant impact on the local economy. Liberty students, employees and staff were responsible for $217 million in direct spending in the Lynchburg area in 2009. One out of every 10 jobs within the City is either directly or indirectly attributable to Liberty University. Local taxes paid by the University itself, university tenants, employees, students and visitors contributed approximately $8.4 million in tax revenue to the region in 2009, and Liberty University generated approximately $5.4 million in tax revenue for the City of Lynchburg. In 2009, out-of-town visitors to Liberty University were responsible for one out of every nine hotel nights spent in the Lynchburg area, resulting in approximately $5.6 million in hotel revenue. Liberty University students and employees provide approximately $4.9 million worth of volunteer service hours in the region each year.

Liberty University and Thomas Road Baptist Church collectively own 6,676 acres in Amherst, Campbell, and Bedford Counties, and the City of Lynchburg. Approximately 678 acres would be considered impervious under EPA's proposed backstop requirements. The greatest amount of impervious area is located in the City of Lynchburg, including the University itself and two for-profit shopping centers known as Candler's Station and The Plaza.

Imposition of EPA's backstop requirements and the Draft TMDL will impose significant direct compliance costs on Liberty University's and TRBC's current operations and their future expansion. These costs may include retrofitting stormwater controls onto existing developments and significant nutrient reduction costs for new developments. In addition, Liberty and TRBC will incur significant indirect costs if the Draft TMDL and the backstop requirements become effective. For example, the City of Lynchburg has indicated that it expects to incur greater than $60 million in compliance costs as a result of the backstop requirements. As the single largest landowners in the region, Liberty University and TRBC will bear the brunt of increased taxes, utility fees and market effects associated with EPA's proposed requirements.

ANALYSIS

As noted above, many of the basic components of the Draft TMDL are contrary to the Clean Water Act. Because of these flaws, as well as EPA's severely truncated comment period and the defects in the agency's modeling for, and the substantive requirements of, the backstop rule, EPA should withdraw the Draft TMDL for additional consideration.

I. The Draft TMDL, the Requirement to Submit WIPs and the Criteria for Approving WIPs are Fundamentally at Odds with the Clean Water Act and EPA's Regulations

EPA's approach for the Draft TMDL follows the approach adopted in the agency's July 2000 revisions to 40 C.F.R. Part 130,[4] which were rejected by Congress before they were finalized[5] and subsequently withdrawn in 2003 by way of a notice and comment rulemaking.[6] Just like in the Draft TMDL, the 2000 TMDL Rule required states to submit "implementation plans" ("IP") as part of their submission of TMDLs for impaired waterbodies.[7] Just like in the Draft TMDL, the 2000 TMDL Rule asserted the right to determine whether there are "reasonable assurances" that an implementation plan would actually be implemented.[8]

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[4] *See* 65 Fed. Reg. 43,586 (July 13, 2000) (the "2000 TMDL Rule").
[5] *See* Military Construction Appropriations Act FY 2000 Supplemental Appropriations, Pub. L. No. 106-426, 114 Stat. 1897 (2000).
[6] *See* 67 Fed. Reg. 79,020 (Dec. 27, 2002) (proposing to withdraw 2000 TMDL Rule); 68 Fed. Reg. 13,608 (Mar. 19, 2003) (finalizing withdrawal of 2000 TMDL Rule).
[7] *See* 65 Fed. Reg. at 43,625; 64 Fed. Reg. at 46,032-33.
[8] *See* 65 Fed. Reg. at 43,625; 64 Fed. Reg. at 46,033-34.

In the proposal for the 2000 TMDL Rule, EPA argued that the language of Section 303(d)(1)(C) authorized the agency to require IPs because the statute "requires TMDLs to be established at levels 'necessary to implement' water quality standards."[9] In the Draft TMDL, EPA does not state a specific source of its authority to require WIPs or to demand reasonable assurances regarding their implementation. Rather, EPA simply states that it is imposing these requirements "pursuant to both the Clean Water Act and the Chesapeake Bay Executive Order."[10] Given that an executive order cannot grant an agency powers that it does not possess under its authorizing statute,[11] and in the absence of a citation to any other section in the Clean Water Act, it appears the agency is again basing its assertion of authority on the phrase "necessary to implement" in Section 303(d)(1)(C). Neither this provision nor Section 117, which specifically addresses the Chesapeake Bay, authorizes EPA's approach.

A. Section 303(d) Does Not Authorize EPA to Demand WIPs or Reasonable Assurances

1. The Plain Language of Section 303(d) does not Authorize the Draft TMDL

First, the language of Section 303(d)(1)(C), when read as a whole, makes it clear that EPA's reading is untenable. The provision reads in full:

> Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314 (a)(2) of this title as suitable for such calculation. *Such load shall be established at a level necessary to implement the applicable water quality standards* with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.[12]

When a state sets a TMDL, it is establishing a "load," *i.e.*, a maximum level of pollutants that can enter a waterbody and still permit compliance with water quality standards, nothing more. EPA's authority to set a TMDL when it rejects a state's submission is similarly focused on the

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[9] 64 Fed. Reg. at 46,016.
[10] Draft TMDL, Executive Summary at 5. In a December 29, 2009 letter from Shawn Garvin to L. Preston Bryant, EPA asserted that Section 117(g) also authorizes its approach in the Draft TMDL. This alleged authority is addressed in Section I.B, below.
[11] *See Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1332-33 (D.C. Cir. 1996) (explaining Executive Order cannot compel agency action contrary to governing statutes).
[12] 33 U.S.C. § 1313(d)(1)(C) (emphasis added).

maximum level of pollutants that can enter an impaired water without causing an exceedence of water quality standards.[13] Nothing in Section 303(d)(1)(C), Congress's use of the phrase "necessary to implement," or any other authority cited by EPA, can be read to grant the agency authority to initiate a wholesale evaluation of a state's legal authority or its budgetary policies regarding water quality.[14]

2. *The Structure of the Clean Water Act's Water Quality Provisions Confirm that Section 303(d) Does Not Authorize EPA's Approach*

Applying EPA's proposed interpretation of a TMDL produces absurd results in other portions of Section 303(d) – as well as other portions of the Act – and confirms that EPA's approach in the Draft TMDL is impermissible. For example, if EPA's right to reject a state's TMDL includes the right to reject its WIP, the agency has only thirty days to develop a federal WIP for each impaired segment.[15] This is a curious result, given that EPA's authority to impose water quality-based effluent limitations under Section 302(b) requires the agency to give 90 days notice before imposing such a limitation.[16]

Similarly, EPA's interpretation allows it to sidestep cost-benefit analyses and procedural requirements in Section 302. EPA has suggested that it cannot consider costs in the development of the Draft TMDL, because Section 303(d) does not authorize the agency to consider costs in setting a TMDL. Of course, if a TMDL is nothing more than an amount of pollutants that can be released into a waterbody without causing a water quality standards exceedence, it makes sense that cost should not be a factor in setting a TMDL. Indeed, cost is irrelevant to the maximum amount of nitrogen, phosphorus or sediment that the Chesapeake Bay can absorb. But, cost is not irrelevant in determining whether – and where – to apply pollution controls to achieve compliance with water quality standards. Congress explicitly acknowledged that fact by creating Section 302(b), which permits EPA to alter water quality-based effluent limitations when:

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[13] *See* 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(c & d).

[14] *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1034 (11th Cir. 2002) (holding consent decree required EPA to follow Clean Water Act to implement TMDL and that Act requires states to implement TMDLs subject to "some oversight" from EPA); *Amigos Bravos v. Green*, 306 F. Supp. 2d 48, 57 (D.D.C. 2004) ("There is no statutory language requiring submission to or approval of a State's implementation plan by the EPA; rather the statute only requires that the EPA approve or disapprove the TMDL."); *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1340-47 (N.D. Cal. 2000) (providing detailed explanation of limited federal authority to enforce TMDLs), *aff'd sub nom Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002).

[15] 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2).

[16] *See Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272, 1277 (D.C. Cir. 1996).

> [T]here is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.[17]

Thus, if EPA is correct about its authority under Section 303(d), Congress authorized EPA to impose water quality-based effluent limits without regard to cost and did not prescribe the process by which the agency could do so. But in the previous section of the Act, Congress required EPA to publish notice 90 days prior to imposing a water quality-based effluent limit, and it created a safety valve to allow EPA and the states to alter those effluent limits based on a cost-benefit analysis. It is unlikely that Congress would create procedural requirements and a cost-benefit safety valve in Section 302 but then authorize EPA to sidestep those requirements through the agency's gap-filling authority for Section 303(d). It is much more likely that EPA's interpretation of Section 303(d) is incorrect.

The fact that Sections 208, 305 and 319 of the Clean Water Act grant EPA limited authority to require states to address sources of non-point source pollution does not alter this conclusion. Ultimately, EPA's authority to take action against states that fail to implement TMDL-related non-point source pollution controls is limited to suspending a state's eligibility for federal Clean Water Act grants and revoking EPA's delegation of NPDES permitting authority.[18] As the Ninth Circuit noted in *Pronsolino v. Nastri*:

> States must implement TMDLs only to the extent that they seek to avoid losing federal grant money; there is no pertinent statutory provision otherwise requiring implementation of [Section] 303 plans or providing for their enforcement.[19]

3. The Draft TMDL is Contrary to EPA's TMDL Regulations

40 C.F.R. Part 130 does not authorize EPA to require a WIP or "reasonable assurances" regarding a WIP for the Chesapeake Bay TMDL (or any other TMDL). As noted above, in 2003, EPA explicitly rejected the notion that its TMDL regulations include either concept.[20] The phrases "watershed implementation plan" and "reasonable assurance" appear nowhere in Part 130.[21]

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[17] 33 U.S.C. § 1312(b)(2)(A).
[18] *See* 67 Fed. Reg. at 79,023 (describing federal authority regarding non-point sources of loads and compliance with water quality standards).
[19] 291 F.3d 1123, 1140 (9th Cir. 2002).
[20] 68 Fed. Reg. at 13,612.
[21] 40 C.F.R. Part 130, *passim*.

Furthermore, EPA rejected the concept of IPs being a part of a TMDL and the notion of requiring "reasonable assurances" of the implementation of an IP. In a notice and comment rulemaking between 2002 and 2003, EPA found this approach is "unworkable" under the Clean Water Act.[22] When an agency announces its understanding of a statute through rulemaking, it may not adopt a contrary interpretation without additional notice and comment rulemaking.[23] EPA has not conducted any further rulemaking regarding IPs or WIPs, and the agency's shift back to requiring implementation plans and "reasonable assurances" is impermissible under the Administrative Procedure Act.[24]

B. Section 117 Does Not Alter EPA's Regulatory Authority regarding the Chesapeake Bay

A review of the language of Section 117 of the Clean Water Act and its legislative history reveals no authority for EPA to require a WIP or "reasonable assurances." When Congress created Section 117 in 1987, it did so in order to create EPA's Chesapeake Bay Office and to authorize the agency to provide technical and financial assistance to *the states' effort* to address water quality. There is nothing in the language of Section 117, as it existed between 1987 and 2000, that affords any Chesapeake Bay-specific regulatory authority to EPA.

The addition of Section 117(g) in 2000 does not alter this conclusion. Rather, Section 117(g) is simply a generalized admonition to EPA and the Chesapeake Executive Council to ensure that management plans are developed and implemented.[25] A comparison of EPA's authority regarding the Great Lakes under Section 118 versus its authority regarding the Chesapeake Bay under Section 117 demonstrates that Congress did not grant EPA any special regulatory authority over the Chesapeake Bay by way of Section 117. Section 118 explicitly authorizes EPA to develop water quality guidance for the Great Lakes, including water quality standards, antidegredation policies and implementation procedures.[26] EPA is to publish the guidance for notice and comment in the Federal Register, and the Great Lakes states:

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[22] *See* 67 Fed. Reg. at 79,025; 68 Fed. Reg. at 13,612. While EPA stated in the final withdrawal notice that this action should not be taken as a decision on the agency's authority for the 2000 TMDL Rule, almost eight years have passed, and EPA has not provided a legal justification for the 2000 TMDL's approach since. In light of the court holdings discussed in note 14, *supra*, it is clear EPA's approach is contrary to the statute.

[23] *See Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987).

[24] EPA's suggestion that the Draft TMDL is a model for future TMDLs in other impaired waters suggests that the agency is trying to accomplish by guidance what it was prohibited from doing by Congress and subsequently withdrew. Substantive changes to the TMDL program require notice and comment rulemaking. *See id.*

[25] *See* 33 U.S.C. § 1267(g)(1).

[26] *See* 33 U.S.C. § 1268(c).

> *[S]hall adopt* water quality standards, antidegradation policies, and *implementation procedures* for waters within the Great Lakes System which are consistent with such guidance.[27]

Section 118(c)(2)(C) continues:

> *If a Great Lakes State fails to adopt such standards*, policies, and procedures, *the Administrator shall promulgate them* not later than the end of such two-year period.[28]

In 1997, the D.C. Circuit affirmed that Section 118 gave EPA authority to develop and impose a federal water quality program for the Great Lakes if the states did not develop their own.[29] To be sure, Congress knew how to create a watershed-specific program that includes backstop authorities along the lines of those asserted by EPA in the Draft TMDL. It created such a program in 1987 for the Great Lakes. The absence of similar language from the original version of Section 117 or the 2000 amendments is conspicuous and it is a clear demonstration of Congress's intent that EPA should not have similar authority in the Chesapeake Bay.[30] And, the fact that Congress felt the need to explicitly authorize the Great Lakes program by adding Section 118 is strong evidence that Section 303(d) – as well as EPA's other water quality-related authorities under the Clean Water Act – do not authorize the agency's approach in the Draft TMDL.

II. EPA's Focus on Achieving Water Quality Standards throughout the Chesapeake Bay Using a TMDL is Impermissible under the Clean Water Act

Section 303(d) explicitly confines the concept of a TMDL to a maximum pollutant load that a waterbody *within a particular state* can receive and remain in compliance with water quality standards. In other words, states set a maximum pollutant load, or TMDL, for waters within their jurisdictional boundaries, and EPA's right to approve or reject a TMDL is limited to determining whether the state's calculated level of permissible daily pollutant loads will achieve

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[27] 33 U.S.C. § 1268(c)(2)(C) (emphasis added).
[28] *Id.*
[29] *See American Iron & Steel Institute v. EPA*, 115 F.3d 979, 987-88 (D.C. Cir. 1997) (concluding authority for EPA's regulatory authority over Great Lakes arises from Section 118).
[30] The legislative histories of Sections 117 and 118 also indicate that Congress did not intend to afford EPA the type of regulatory authority over the Chesapeake Bay that it gave the agency regarding the Great Lakes. *Compare* H.R. Conf. Rep. No. 99-1004 at 93 (discussing grant program established by Congress in 1987 for Chesapeake Bay) *and* H.R. Conf. Rep. 106-995 at 36-37 (discussing purpose of adding subsection (g) to Section 117 and stating purpose was to require EPA to ensure "plans are developed and implementation is begun" by the states) *with* H.R. Conf. Rep. No. 99-1004 at 95 (stating Section 118 requires EPA "to develop and implement action plans" to improve water quality and to incorporate those plans into states' non-point source pollution plans under Section 319).

compliance with the approved water quality standards. In relevant part, Section 303(d)(1)(A) reads:

> *Each State shall identify those waters within its boundaries* for which the effluent limitations required by section 1311 (b)(1)(A) and section 1311 (b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters.[31]

Section 303(d)(1)(C) then requires:

> Each State shall establish *for the waters identified in paragraph (1)(A)* of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314 (a)(2) of this title as suitable for such calculation.[32]

Thus, the plain language of the Clean Water Act indicates that TMDLs are to be established on a state-by-state basis. As a consequence, a TMDL for a surface water in Virginia may not be determined based upon whether pollutant loads in Virginia will have an effect on surface water quality in another state.

When discharges in one state cause water quality standards violations in another, the Clean Water Act creates an NPDES permit objection process that is designed to force *the states* to reach an agreement on how to resolve the problem, *but that accord is largely a matter of state law and beyond the scope of the Clean Water Act*. Section 402 permits EPA to object to NPDES permits issued by the offending state and it permits the affected state to object to NPDES permits by way of a water quality standards compliance certification under Section 401.[33] Combined, these objection authorities encourage the states to come to an agreement as to additional pollutant load reductions, *pursuant to their state law-based authorities*. By establishing maximum pollutant loads for waters in one state based on water quality effects in another state, EPA has exceeded its authority under Section 303(d).

To the extent that EPA believes it has authority to address interstate water quality matters under other portions of the Clean Water Act, such as Section 302 or 330, the agency has not asserted those authorities in this proceeding, nor has it complied with the procedures of those provisions, nor has it explained the basis for its assertion of that authority. Hence, those authorities are not relevant to the Draft TMDL.

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[31] 33 U.S.C. § 1313(d)(1)(A) (emphasis added).
[32] 33 U.S.C. § 1313(d)(1)(C) (emphasis added).
[33] *See* note 14, *supra*.

III. EPA has not Afforded the Public Sufficient Opportunity to Comment

An agency must:

> [G]ive interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments.[34]

An agency notice of proposed rulemaking must:

> [P]rovide sufficient detail and rationale for the rule to permit interested parties to participate meaningfully.[35]

As EPA is aware:

> An agency commits serious procedural error when it fails to reveal portions of the technical basis for the proposed rule in time to allow for meaningful commentary.[36]

In light of these principles of administrative law, EPA risks reversal of the Draft TMDL unless it immediately extends the comment period for at least 180 additional days after the agency makes all of its modeling and related data available to the public.

A. EPA has not Made Critical Portions of the Record Available to the Public for Review and Comment

As described in Section I of the National Association of Home Builders' ("NAHB") comments and Section II.A of the Federal Water Quality Coalition's ("FWQC") comments regarding the Draft TMDL,[37] EPA has not made much of the data and results of its Scenario Builder model available to the public for review.[38] In addition, EPA has not published the specific model inputs and outputs used to develop the Draft TMDL.[39] Furthermore, EPA has not

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[34] *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (quoting *Connecticut Power & Light Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir 1982)).
[35] *Complex Horsehead Resource Development Co. v. EPA*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (quoting *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991)).
[36] *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (quoting *Connecticut Power & Light Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir 1982)).
[37] Liberty hereby incorporates the comments of NAHB and the FWQC regarding the Draft TMDL by reference to the extent those comments are not inconsistent with Liberty's.
[38] *See* NAHB Comments at 3-7; FWQC Comments at 14-16.
[39] *Id.*

made the programming code for Scenario Builder available to the public.[40] Finally, EPA has admitted in public hearings and its website that the agency has not yet finalized the Scenario Builder model.[41] EPA's lack of transparency regarding this fundamental element of the Draft TMDL is contrary to the D.C. Circuit's statement in *Sierra Club v. Costle*:

> The safety valves in the use of such sophisticated methodology are the requirement of public exposure of the assumptions and data incorporated into the analysis and the acceptance and consideration of public comment, the admission of uncertainties where they exist, and the insistence that ultimate responsibility for the policy decision remains with the agency rather than the computer.[42]

The court also explained that:

> [T]he agency must sufficiently explain the assumptions and methodology used in preparing the model; it must provide a "complete analytic defense of its model (and) respond to each objection with a reasoned presentation." The technical complexity of the analysis does not relieve the agency of the burden to consider all relevant factors and to identify the stepping stones to its final decision. There must be a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from these results.[43]

Because of the lack of information available for the modeling that underlies the Draft TMDL, it does not appear that EPA can satisfy its burdens regarding providing the public with an opportunity to comment on the Draft TMDL.

B. The *Foster* Deadlines Do Not Alter EPA's Statutory Duties under the Clean Water Act and the Administrative Procedure Act

In the Draft TMDL and in EPA's October 25, 2010 statement regarding its denial of an extension of the comment period for the Draft TMDL,[44] the agency argued that it could not extend the comment deadline for the following reasons:

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[40] *Id.*
[41] *Id.*
[42] 657 F.2d 298, 332-33 (D.C. Cir. 1981).
[43] *Id.*
[44] *See* U.S. EPA, Statement on EPA Decision Not to Extend the Bay TMDL Public Comment Period (Oct. 25, 2010).

- An agreement between the states and EPA requires that the Draft TMDL be finalized by December 31, 2010;
- Executive Order 13508 requires EPA to finalize the Draft TMDL by December 31, 2010;
- EPA's settlement agreement in *Fowler v. United States* requires EPA to finalize the Draft TMDL by December 31, 2010; and
- The fact that EPA and the states have been working on resolving water quality impairment in the Chesapeake Bay for a number of years.

None of these reasons are sufficient to invalidate EPA's statutory, and ultimately constitutional, duty to afford the public a meaningful opportunity to comment on the Draft TMDL. In *Cronin v. Browner*, Judge Schwartz of the Southern District of New York ruled on a request by EPA to extend the deadlines for EPA to promulgate rules implementing Section 316(b) of the Clean Water Act. Even though EPA had not demonstrated good cause for relief from the deadlines in the court's consent decree, he explained:

> It is important that the regulations have a sound, scientific basis, comport with the requirements of the [Clean Water Act], are compatible with other regulatory programs, and further EPA's broad policy goals of protecting human health and the environment.[45]

Thus, the Court granted EPA's request to extend the deadline. The Court went on to say:

> Because of the significant amount of work remaining to be completed, the Court concludes that EPA cannot promulgate a scientifically and legally defensible rule [by the deadline]. *The public interest in the prompt issuance of a Regulation*, while important in consideration of the modification deadlines, *is out-weighed... by the need to prepare a regulation that minimizes adverse environmental impact ... and enables attainment of water quality....*[46]

To be sure, EPA's obligation to develop a prudent and effective regulation in compliance with the Clean Water Act and the Administrative Procedure Act takes precedence over any deadline imposed by a settlement agreement with a private party or an executive order. As part of that effort, EPA must provide the public with the agency's factual and legal basis for the Draft TMDL and it must afford the public sufficient time to review, digest and critique EPA's analysis.

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[45] 90 F. Supp. 2d 364, 373 (S.D.N.Y. 2000).
[46] *Id.* (emphasis added).

IV. EPA's Draft TMDL is Arbitrary and Capricious and is not Supported by Substantial Evidence

The modeling in support of the Draft TMDL remains unfinished, and a number of EPA's factual assumptions in support of the Draft TMDL and the backstop rule are erroneous. As such, they are inconsistent with EPA's duties under the Clean Water Act and the Administrative Procedure Act.

A. Finalizing the Draft TMDL and the Backstop Rule Prior to Completing Water Quality Modeling for the Bay is Arbitrary and Capricious

EPA has publicly admitted that it does not intend to finalize its modeling, or correct known errors in the model, until after it promulgates the final TMDL and backstop rule for the Chesapeake Bay.[47] The agency contends that:

> In no case, does EPA anticipate any likelihood of a jurisdiction 'over-controlling' between now and 2017 in this first phase of planning and implementation.[48]

But, this justification misses the point. First, the backstop rule's wasteload allocations will be effective when the Draft TMDL becomes final and EPA rejects a state's final WIP.[49] If a point source is required to begin reducing its discharges of nitrogen, phosphorus or sediment shortly thereafter, the TMDL's consequences will certainly be felt before 2017. Because it is impossible for EPA to know whether the allocations are appropriate until the agency corrects its modeling, there is no way to know whether the backstop rule will force point source dischargers to incur significant compliance costs that will ultimately prove unnecessary. Second, EPA's rulemaking is subject to judicial review based on the administrative record at the time it takes final action.[50] If EPA finalizes the Draft TMDL on December 31, 2010, a court will judge it based upon the information before the agency on that date. If EPA's model bears "no rational relationship to the reality it purports to represent," the court will reject the Draft TMDL.[51]

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[47] *See* Letter from Shawn Garvin, Regional Administrator, EPA Region III to the Principals' Staff Committee (June 11, 2000); FWQC Comments at 18; Comments of Henrico County, Virginia at 4-6; Comments of the Virginia Association of Realtors.
[48] *Id.*
[49] *See* FWCQ Comments at 18.
[50] *See National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007).
[51] *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C.Cir.1998).

B. Specific Technical Issues regarding the Draft TMDL

Liberty is concerned about a number of technical issues associated with the Draft TMDL, including the following:

1. *The Draft TMDL Abandons Years of Work by James River Communities to Address Water Quality*

Communities in the James River watershed have spent years working with EPA to improve their wastewater and stormwater infrastructure. Cities like Lynchburg have made significant capital improvements to their systems as a result of this effort, and the Draft TMDL fails to acknowledge or consider those efforts in setting load allocations for wastewater or stormwater facilities on the James River. Rather, the Draft TMDL simply imposes a one-size-fits-all mandatory reduction for nitrogen, phosphorus and sediment on all wastewater treatment plants. In so doing, EPA has failed to consider all relevant factors with respect to those wasteload allocations. To the extent EPA believes it may not consider anything other than achieving compliance with the water quality standards in determining wasteload allocations, such an interpretation of Section 303(d) is inconsistent with the Clean Water Act, as previously discussed.[52]

2. *EPA Rejects the Notion of Nutrient Trading Programs, which are a more Cost Effective Approach for Improving Water Quality*

As discussed more fully in the comments of the Virginia Association of Municipal Wastewater Authorities ("VAMWA"), the Draft TMDL ignores more efficient means of reducing pollutant loads in the James River, such as establishing a nutrient reduction credit trading program to allow pollutant reductions to come from the most economically efficient sources.[53] EPA has not explained why the backstop rule does not consider allowing point sources subject to federal wasteload allocations to accomplish those reductions through a federal credit trading program.[54] Rather, the agency simply rejected Virginia's WIP and concluded that

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[52] *See Sea-Land Serv. v. DOT*, 137 F.3d 640, 646 (D.C. Cir. 1998) ("An agency action, however permissible as an exercise of discretion, cannot be sustained when it is not based on the agency's own judgment but on an erroneous view of the law.").

[53] Liberty hereby incorporates the comments of VAMWA regarding the Draft TMDL by reference to the extent those comments are not inconsistent with its own.

[54] *See Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 48-49 (1983) (explaining agency must justify rejection of alternatives within ambit of applicable law). Agency actions based on erroneous understandings of the law must be rejected.

the Commonwealth's state-based trading program does not satisfy EPA's reasonable assurance criterion.[55]

In addition to suggesting that EPA has not considered all relevant factors in developing the Draft TMDL, the agency's treatment of nutrient trading programs also reinforces the dubious nature of EPA's claim of authority to impose the requirement for WIPs or reasonable assurances at all. If Sections 117 and 303(d) contain a broad enough delegation of authority to establish requirements for WIPs and for reasonable assurances, why are those authorities insufficient to authorize a federally created trading program? In essence, EPA has prevented itself from considering the cost of implementing the Draft TMDL by way of an erroneous interpretation of the law. Given that an agency must provide a legally defensible justification for a proposed rule, EPA should withdraw the Draft TMDL for further consideration.[56]

CONCLUSION

For the foregoing reasons, Liberty believes that EPA should withdraw the Draft TMDL and afford the public at least 180 days to review and comment on any future TMDL for the Chesapeake Bay.

Sincerely,

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[55] *See id.*
[56] *See id.*